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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 685

SIDNEY J. UNGAR,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Appellate Division, First Department (hereinafter referred to as "the Appellate Division"), made and entered on April 25, 1967, denying petitioner's motion to vacate the Appellate Division's order of April 21, 1966, disbarring petitioner. On July 7, 1967, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal.

ARGUMENT

POINT I

The present petition for a writ of certiorari is, in substance, an untimely petition for rehearing of this Court's order denying a prior petition for certiorari to review the order of disbarment.

On November 4, 1966, petitioner filed in this Court a petition for a writ of certiorari to review the order of the Appellate Division disbarring him. The principal argument then advanced for granting the writ, in the language of the petition, was that "disciplinary charges based upon matters concerning which petitioner testified before Grand Jury under grant of immunity violate self-incrimination privilege". It appears, therefore, that the principal issue then advanced by petitioner is substantially identical to the only question of which review is now sought.

In that portion of its brief in opposition to the prior petition for certiorari concerning this contention, respondent argued that 1) petitioner had abandoned any claim under the Fifth Amendment of the Constitution of the United States; and 2) in any event, the privilege against self-incrimination was, by its own terms, limited to "any criminal case" and, consequently, immunity did not extend to disciplinary proceedings.

The prior petition for certiorari was denied by this Court on January 9, 1967. One week later, on January 16, 1967, this Court's decision in *Spevack* v. *Klein*, 385 U. S. 511, was announced. This chronology indicates that *Spevack*, the decision upon which petitioner principally relies in support of the present petition for certiorari (Pet. p. 3),

was before the Court at the time it denied the first petition for certiorari. Moreover, the *Spevack* decision was announced well within the 25 days within which petitioner could have filed a petition for rehearing of the order denying his prior petition for certiorari pursuant to Rule 58 of the Rules of this Court. Nevertheless, no such petition for rehearing was filed.

On April 25, 1967, the Appellate Division denied petitioner's motion to vacate its prior order of disbarment. That decision was predicated, in part, upon an express finding that, as respondent had urged in this Court in opposition to the prior petition for certiorari, petitioner had abandoned his reliance upon the federal privilege against self-incrimination. The Appellate Division at the same time denied petitioner's request for the alternative relief of amending the order of disbarment to recite that constitutional questions were raised and necessarily passed upon, relief it had previously denied by order entered June 30, 1966, prior to the filing for the first petition for certiorari in this Court.

In these circumstances, it is respectfully submitted that all of the facts now relied upon by petitioner were in existence at the time his prior petition for certiorari was denied by this Court and that the present petition is, therefore, in substance a petition for rehearing of that prior denial filed outside the time specified by Rule 58 of the Rules of this Court.

POINT II

The order of which review is sought rests upon an adequate non-federal basis.

In denying petitioner's motion to vacate his disbarment, review of which is here sought, the Appellate Division held that the charges based upon petitioner's conviction for criminal contempt, which are concededly not affected by his Fifth Amendment argument, themselves warrant disbarment (Appendix to Pet. p. A-1). Petitioner, although seeking to reserve the point if certiorari is granted, does not contend that this determination by the Appellate Division itself warrant certiorari.

It is respectfully submitted, therefore, that the Appellate Division's determination that petitioner should be disbarred solely on the basis of charges not affected by the issue of which review is sought by the present petition for certiorari constitutes an adequate non-federal basis, within the context of this proceeding, to support the order denying petitioner's motion to vacate his disbarment.

POINT III

Petitioner categorically abandoned any claim arising under the Federal privilege against self-incrimination while the disciplinary proceeding was pending.

Petitioner filed an answer to the charges instituted in the Appellate Division containing, as a fifth affirmative defense, a contention that inasmuch as he had testified before the Grand Jury and received immunity from prosecution, that portion of the disciplinary proceeding (Charges III and IV) predicated upon his aiding and abetting Hulan E. Jack, then borough president of Manhattan, in violating the New York City Charter and conspiring to obstruct justice violated his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law. Respondent moved to strike all of the affirmative defenses contained in the answer on the ground that they were insufficient as a matter of law. In an affidavit dated February 27, 1963, submitted in opposition to the motion to strike the affirmative defenses and in support of a cross-motion, petitioner's then counsel, Leonard B. Boudin, Esq., stated (para. 24, p. 9):

> *"We pass over the reference to self-incrimination under the Federal Constitution.* In all candor, it does not seem to [petitioner], upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved although, of course, the right to Federal due process is involved. *In this respect, [respondent] would be entitled to a grant of its motion limited to striking out the reference to the Federal Constitutional privilege against self-incrimination."* (Emphasis supplied.)

Since petitioner himself thereby "passed over" any issue under the Federal constitutional privilege against self-incrimination, the Appellate Division did so also. This was manifested in that Court's denial on two occasions of petitioner's motion to amend the order of disbarment to recite that constitutional questions were raised and necessarily passed upon and by its express finding of abandonment in the decision of which review is here sought.

By order entered March 21, 1963, the Appellate Division granted respondent's motion and struck all of the affirmative defenses contained in petitioner's answer to the charges. Petitioner unsuccessfully sought to appeal that order to the Court of Appeals. In an affidavit dated April 22, 1963, submitted in support of his motion for leave to appeal, petitioner's then counsel stated that one of the issues raised was "whether the granting of immunity to respondent by virtue of his testimony before a Grand Jury does not include protection against a disciplinary proceeding". In view of the abandonment of any claim under the Federal constitutional privilege against self-incrimination contained in the affidavit submitted by the same attorney in opposition to respondent's motion to strike the affirmative defenses, it is clear that this reference was to petitioner's claim under the State constitutional privilege against self-incrimination which petitioner had never withdrawn.

Having thus abandoned any claim under the Federal constitutional privilege against self-incrimination, petitioner did not raise it in the Court of Appeals when he sought to appeal his disbarment as of right and by leave of that Court. Although petitioner submitted affidavits and a brief to the Court of Appeals in opposition to respondent's motion to dismiss his appeal as of right and in support of his

motion for leave to appeal, he did not disclose therein that he had testified before a Grand Jury or that he had done so after having been granted immunity from prosecution. He made no specific reference to the fifth affirmative defense contained in his answer. In fact, in his affidavit of May 25, 1966, in support of his motion for leave to appeal, petitioner, in referring to the striking of his affirmative defenses, stated (p. 20), "principally here involved are my Fourth and Sixth affirmative defenses, which pertained to the contempt charges". He submitted no argument whatever addressed to any claim under the self-incrimination provisions of the Federal Constitution and could not have done so inasmuch as he did not disclose the fact of his appearance before a Grand Jury upon which such an argument would have to be predicated. This failure on petitioner's part to raise the issue in the Court of Appeals was so clear that his prior petition for a writ of certiorari submitted to this Court, in summarizing the arguments raised in the Court of Appeals, made no reference to any claim arising under the privilege against self-incrimination even though that was the principal argument advanced in the petition itself.

We respectfully submit that the foregoing clearly demonstrates, as the Appellate Division has held, a categorical abandonment by petitioner of any claim under the Federal constitutional privilege against self-incrimination. Consequently, the question presented in support of the present petition for certiorari, "whether disbarment is a criminal sanction within the scope of the Fifth Amendment, as incorporated in the Fourteenth Amendment with respect to state action, so that incriminating testimony compelled under a grant of immunity is precluded from use in the disciplinary proceeding," cannot now be raised inasmuch

as it does not affirmatively appear from the record that the federal question here urged was presented to the State courts, *Lynch et al* v. *N. Y. ex rel. Pierson,* 293 U. S. 52; *Ellis* v. *Dixon et al., Members of the Board of Education of the City of Yonkers,* 349 U. S. 458.

POINT IV

The decision of this Court in *Spevack* v. *Klein* does not warrant retroactive application.

The decision in *Spevack* v. *Klein, supra,* was announced on January 16, 1967. Petitioner's first petition for certiorari, submitted to this Court while the *Spevack* case was awaiting decision, was denied on January 9, 1967. His disbarment, under the order of the Appellate Division of April 21, 1966, became effective on that date when the stay granted by Mr. Justice Harlan pending determination of the petition expired.

This Court, of course, gave no indication in deciding *Spevack* as to whether it should be applied retroactively. However, this Court's recent opinions with respect to the issue of retroactivity strongly suggest that decisions involving interpretations of the constitutional privilege against self-incrimination, such as *Spevack,* will be given prospective effect only. Thus, retroactivity was denied to the doctrine of *Griffin* v. *California,* 380 U. S. 609, forbidding adverse comment upon a defendant's failure to testify in a state criminal trial, in *Tehan* v. *Shott,* 383 U. S. 406. Similarly, retroactivity was denied to the doctrines promulgated in *Escobedo* v. *Illinois,* 378 U. S. 478 and *Miranda* v. *Arizona,* 384 U. S. 436, in *Johnson* v. *New Jersey,* 384 U. S. 719.

In the latter case, this Court noted, 384 U. S. at 727-8, that constitutional rules announced by it would be applied retroactively if they concerned evidence of doubtful reliability and relevancy, affecting the very integrity of the fact-finding process, with the result that retroactivity averted the danger of convicting the innocent. Since there is no basis for concluding that testimony improperly compelled by the threat of disbarment for silence, a procedure declared to be unconstitutional in *Spevack*, in any way bears upon the accuracy and reliability of such testimony, it would appear that the *Spevack* decision is to be given prospective effect only and is not applicable to cases, such as that of petitioner here, concluded prior to the announcement of that decision.

POINT V

The immunity afforded respondent was co-extensive with the scope of the privilege against self-incrimination and did not afford immunity against disciplinary proceedings.

Self-incriminating testimony may be compelled by a grant of immunity co-extensive with the scope of the privilege, *Counselman* v. *Hitchcock*, 142 U. S. 547. Since the privilege itself prohibits the use of compelled testimony only in a criminal case, and petitioner admittedly received immunity from criminal prosecution when he testified before the Grand Jury, it follows that the constitutional provision has been satisfied and that petitioner's testimony was not improperly compelled. Moreover, since disciplinary proceedings are civil rather than criminal in nature, *Ex Parte Wall*, 108 U. S. 265, 288, the immunity conferred

upon petitioner did not prohibit the filing of charges of misconduct predicated upon the subject matter of his testimony before the Grand Jury.

In an effort to overcome the clear wording of the constitutional provision, petitioner argues that the recent decisions of this Court in *Spevack* and related cases expanded the term "in any criminal case" as used in the Fifth Amendment to include disciplinary proceedings. We respectfully submit that nothing contained in any decision of this Court warrants such a conclusion.

The principal case upon which petitioner relies is *Spevack* v. *Klein, supra.* Had this Court intended that its decision in that case should stand for the proposition that the privilege against self-incrimination permitted an attorney to refuse to answer a question in the course of a disciplinary proceeding upon the ground that his answer might tend to subject him to discipline (which necessarily follows if disciplinary proceedings are encompassed within the term "in any criminal case" used in the Fifth Amendment), it would undoubtedly have said so and the issue there posed would have been immediately resolved. No such proposition is contained in the Court's opinion.

The majority opinion in *Spevack* indicates that the Court did not expand the scope of the privilege but rather found that the act of the State, disbarment, was an improper form of compulsion forcing the attorney to relinquish his constitutional privilege not to incriminate himself "in any criminal case". Thus, Mr. Justice Douglas, writing for the majority, stated:

> "The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood,

> are powerful forms of compulsion to make a lawyer relinquish the privilege."

It follows, therefore, that this Court reversed the disbarment in *Spevack,* not because the attorney there involved had the right to refuse to answer questions which might tend to subject him to discipline (such questions being outside the scope of the privilege), but because disbarment was an improper penalty for the attorney's exercise of his constitutional right not to answer questions which might tend to incriminate him, he, unlike petitioner here, having no immunity from criminal prosecution.

The fact that this Court's decision in *Spevack* turned upon a finding of improper compulsion rather than expansion of the scope of the privilege against self-incrimination appears from the related case, decided the same day, of *Garrity* v. *New Jersey,* 385 U. S. 493. There the Court prohibited the use by the prosecution at a criminal trial of testimony compelled by threat of loss of job upon refusal to answer for any reason, The Court concluded that the testimony elicited and sought to be used in support of criminal charges against the defendants, who also unlike petitioner here did not have immunity from criminal prosecution, had been improperly compelled. Thus, the Court, again speaking through Mr. Justice Douglas, stated:

> "The choice given appellants was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent . . . "

It was precisely because this Court did not expand the scope of the privilege but concerned itself with a determi-

nation of conduct by the State which constituted improper compulsion directed toward an individual to force him to waive his existing privilege against self-incrimination, that Mr. Justice Fortas could concur in the *Spevack* decision while pointing out that, in his judgment, a public employee who refused to answer questions directly related to the performance of his official duties could be discharged even though his refusal was predicated upon the invocation of the privilege against self-incrimination. This expression by Mr. Justice Fortas, whose vote was essential to the majority in *Spevack*, is inconsistent with petitioner's assertion that the scope of the privilege must be interpreted to encompass any governmental act which in any sense "punishes" or affects the individual adversely.

The dissenting opinion of Mr. Justice White further indicates that the Court itself considered *Spevack* to be simply a "compulsion" case and not one expanding the scope of the privilege. Thus, he dissented upon the ground that the attorney in *Spevack* could not give any statements which would tend to incriminate him since, if they were furnished under the compulsion of threat of disciplinary action if he refused, *Garrity* prohibited their use against him in any subsequent criminal prosecution. As in the case of the concurring opinion of Mr. Justice Fortas, this dissenting view is inconsistent with the interpretation advanced by petitioner that the majority opinion in *Spevack* stands for the proposition that the attorney had the right to refuse to answer questions because they might tend to subject him to discipline, a contention which necessarily flows from the claim that the immunity tendered by the Grand Jury encompasses the imposition of discipline because immunity must be as extensive as the scope of the privilege.

It should be noted, moreover, that the present case is factually as well as legally distinguishable from *Spevack* and the other cases relied upon by petitioner, *Kaye* v. *Coordinating Committee,* 386 U. S. 17 and *Zuckerman* v. *Greason,* 386 U. S. 15, rehearing den., 386 U. S. 969. Thus, petitioner here, unlike any of the attorneys in the cited cases, received immunity from criminal prosecution after first invoking his privilege against self-incrimination. Consequently, in each of the cases relied upon by petitioner the attorney was faced with the still existing possibility that he might be subject to criminal prosecution for any crime disclosed if he answered, while petitioner had been granted complete immunity from such prosecution.

In addition to relying upon decisions of this Court which were pending at the time his first petition for certiorari was denied but which were only later announced, petitioner also reasserts contentions predicated upon prior decisions of this Court, principally *Boyd* v. *United States,* 116 U. S. 616. Such claims, in addition to being untimely, find no support in the opinions relied upon. Thus, *Boyd* and subsequent decisions of this Court which followed it, are distinguishable. As the Court noted in *Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 701, the *Boyd* situation required a determination that the criminal law had been violated, the forfeiture there sought being authorized as an alternative to imprisonment and/or fine in the same statute. Consequently, if the claimant there were compelled to give testimony, he would be asked to provide evidence to establish a violation of what this Court concluded was essentially a criminal statute, i.e. to incriminate himself.

It is significant to note, in this context, that the record discloses that petitioner was not misled concerning the ex-

tent of the immunity afforded to him before the Grand Jury. Thus, when called as a witness at the trial of the case of *People* v. *Jack,* petitioner conceded that it was his understanding that he had received immunity from prosecution for crimes but had not received immunity from any "disbarment proceeding" that might be instituted (Pet. Ex. 11, p. 321; Min. p. 1734).

In substance, petitioner is contending that a disciplinary proceeding is "a criminal case" within the meaning of the Fifth Amendment of the Constitution of the United States. Yet he has himself acknowledged that other principles of criminal law are inapplicable to such proceedings. Thus, in his brief to the Court of Appeals of the State of New York in support of his motion for leave to appeal from the order of disbarment, petitioner himself stated, in part, that "the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here".

This Court has likewise continued to recognize the essential civil nature of disciplinary proceedings since the decision of *Ex Parte Wall, supra,* in 1882. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

In summary, it is respectfully submitted that petitioner's contention that the immunity he received from prosecution for any crimes revealed in his testimony before the Grand

Jury also immunized him against any disciplinary proceeding is clearly without merit. Adoption of that proposition would mean, for example, that an attorney who had bribed a public official and had been given immunity from prosecution for the crime in order that his testimony might be used in criminally prosecuting that public official, would thereafter not only be immune from prosecution for his own crime but would have to continue to be certified as an attorney in good standing by all the courts to which he was admitted and could even continue to practice before the very agency he had corrupted. Such an astounding proposition finds no support in the Fifth Amendment or in any of the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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